APPENDIX "A"

"Dear Saul,

As per our joint venture, it is agreed that you shall put up the sum of $300,000.00 of which sum I am borrowing $150,000.00. Said funds shall be used to purchase 50,000 shares of Omega Equities, Incorporated, common stock, under an investment letter. You shall own 25,000 of these shares, and I shall own the other 25,000, which I pledge to you as collateral on the above loan.

I agree to repay the above $150,000.00 to you by May 31, 1969. I further agree to purchase from you, in the event you desire to sell to me, your 25,000 shares of the above stock at a price of $10.00 per share. Said purchase to take place between October 1, 1969, and December 21, 1969. In the event, I fail to pay the purchase price of said stock within ten days from tender of same, you may sell said shares, and I shall be liable to you for any sums less than $10.00 per share.

I agree not to sell any of my shares prior to December 31, 1969, without your prior written consent unless all my obligations to you in this joint venture have been satisfied.

I agree to take out a life insurance policy in the sum of $400,000.00 made payable to you, said policy to stay in good standing until the conclusion of this agreement. I shall pay the premiums on said policy, and you shall be the owner of same.

It is understood that said shares of Omega stock shall be held jointly by us as Trustees, and that said stock shall be 50,000 shares of a 100,000 share certificate. The other 50,000 shares shall be held by us as Trustees until

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registration, at which time they shall be registered in the respective owners' names. At time of registration, the 50,000 owned by us shall be registered, 25,000 shares in your name, and in the event I have an obligation still due and owing to you, 25,000 shares in our joint names, otherwise in my name.

Very truly yours,

Richard H. Olsen,
Palm Bay Club,
Miami, Florida 33135."

APPENDIX "B"

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1974
MONDAY, JUNE 24, 1974

SAUL GOODMAN,	**	
Petitioner,	**	
vs.	**	WRIT OF CERTIORARI
RICHARD H. OLSEN,	**	CASE NO. 45,356
Respondent.	**	

The Petition herein for a Writ of Certiorari to the District Court of Appeal, Third District of Florida, is granted and the cause is hereby set down for oral argument at 9:30 o'clock a.m. Friday, September 13, 1974.

A maximum of 15 minutes to the side is allowed but counsel is expected to use only so much of that time as is necessary.

Either side may waive oral argument. If both sides waive oral argument the case will be promptly assigned for decision and the cause expedited.

The Court has tentatively accepted jurisdiction of this case; however, the parties should be prepared to argue the jurisdictional issue should the question be raised by the Court.

The time for filing briefs on the merits is set forth in Rule 4.5(c)(6), F.A.R.

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ADKINS, C.J., ROBERTS, McCAIN, DEKLE and OVERTON, JJ., concur

A True Copy
TEST:

/s/Sid J. White
Sid J. White
Clerk Supreme Court.
By: Sara Gainey, D.C.

sg
cc: Honorable William P. Carter, Clerk
Law Offices of Leo Greenfield
Messrs. Prunty, Ross, DeLoach & Olsen

APPENDIX "C"

Not final until time expires to file Rehearing Petition and, if filed, determined.

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A. D. 1974

SAUL GOODMAN, *Petitioner,*	:	CASE NO. 45,356
v.	:	DCA CASE NO.
RICHARD H. OLSEN, *Respondent.*	:	72-798

Opinion files November 7, 1974
Writ of Certiorari to the District Court of Appeal, Third District
Leo Greenfield of the Law Offices of Leo Greenfield; and Frank Ragano, for Petitioner
John W. Prunty of Prunty, Ross, DeLoach and Olsen, for Respondent

McCAIN, J.

This cause is before the Court on a petition for writ of certiorari. We have jurisdiction pursuant to Article V, Section 3(b)(3), Florida Constitution.

The respondent, Olsen, an attorney from Florida, prepared and executed an agreement in New York in which he stated that as per a "joint venture" the petitioner, Goodman, was to advance the sum of $300,000 for the purchase of 50,000 shares of stock in Omega Equities, Incorporated, $150,000 of which was characterized as a loan to Olsen. Under the terms of the agreement, Goodman was to own 25,000 shares and Olsen was to own the other 25,000 shares which he pledges as collateral on the loan.

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Olsen agreed to repay the $150,000 by a stipulated date, and further agreed to purchase the petitioner's 25,000 shares at $10.00 per share in the event that Goodman desired to sell on or before a stipulated date. In addition, Olsen agreed that in the event that he failed to pay the stipulated purchase price, he would be liable for any sum up to $10.00 per share upon the sale of Goodman's shares.

After the execution of this agreement by Olsen, Goodman gave Olsen a check in the amount of $300,000 and Olsen purchased the stock. Olsen had repaid approximately $60,000 of the $150,000 when this action was commenced in Dade County, Florida.

Goodman filed suit seeking not only the $90,000 balance remaining on the loan but further sought damages for breach of contract for failing to buy back the 25,000 shares of stock at $10.00 per share. Olsen defended by alleging that he had refused to buy back the stock only after he was advised that the contract was usurious.

The jury returned a verdict in favor of Olsen and upon appeal to the District Court of Appeal, Third District, that judgment was affirmed per curiam.

Before determining whether any error has been committed, it is first necessary to determine whether the Florida or New York usury statute is applicable. Then the agreement must be scrutinized to determine, under that choice of law, whether the agreement is usurious, and finally, if necessary, what remedies are applicable.

As to the first question, concerning the choice of law, this Court in Wingold v. Horowitz, 292 So. 2d 585, 586 (1974), citing from Brown v. Case, 80 Fla. 703, 86 So. 684 (1920), stated:

> "The rule thus laid down by the Supreme Court of the United States was recognized by the Supreme Court of Florida as early as 1856.
>
> "[1] 'The general principle adopted by civilized nations is, that the nature, validity and interpretation of contracts, are to be governed by the lex loci of the country where the contracts are made or are to be performed; but the remedies are to be governed by the lex fori.' Perry V. Lewis, 6 Fla. 555."

Therefore, it is necessary to ascertain whether the agreement is usurious under the New York usury statute, since the validity of the agreement is governed by the lex loci contractus.

The general rule in New York is that a loan is usurious where the lender is entitled to the return of the principal and the full legal rate of interest plus a bonus to be paid upon a contingency over which the borrower has no control. This contingent right to a bonus must be something of value and when added to the maximum interest results in a total interest in excess of the legal rate. Webster v. Roe, 212 App. Div 756, 210 N.Y.S. 366 (1925); aff'd. 241 N.Y. 570, 150 N.E. 559 (N.Y. 1925); Moore v. Plaza Commercial Corp., 9 App. Div.2d 223, 192 N.Y.S.2d 770 (1959), aff'd. 8 N.Y.2d 813, 202 N.Y.S.2d 321, 168 N.E.2d 390 (N.Y. 1960); et seq.

However, an agreement to pay an amount which may be more or less than the legal interest, depending

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upon a reasonable contingency, is not *ipso facto* usurious, because of the possibility that more than the legal interest will be paid. Hartley v. Eagle Ins. Co., 222 N.Y. 178, 118 N.E. 622 (1918); In re Bechtoldt's Estate, 159 Misc. 725, 289 N.Y.S. 838 (Surr.Ct., Clinton Co., 1936).

Additionally, a loan has been deemed not usurious where the money is in fact advanced for the purpose of a joint venture (Salter v. Havivi, 30 Misc.2d 251, 215 N.Y.S.2d 913 (Sup.Ct., N.Y. Co., 1961) or where there is *no certainty* that the bonus plus the stipulated interest will exceed the legally allowable rate of interest. Richardson v. Hughitt, 31 N.Y. 55 (1879); Cusick v. Ifshin, 334 N.Y.S.2d 106, 70 Misc. 2d 564, aff'd 341 N.Y.S.2d 280, (Sup.Ct.App. Term, 1973).

Under the terms of the written agreement, sub judice, the statement that the agreement is a "joint venture" is not absolutely determinative of the issue, although this language contained in the agreement is an important factor to be considered in the determination of its character. The answer lies in the intent of the parties rather than the choice of language.

Notwithstanding, it is clear from the intent of the parties as reflected in their actions after the consummation of the agreement, that the parties intended a "joint venture," that is: to carry out a single business enterprise for profit, for which purpose they combined their money, efforts and skills. The record clearly shows that Goodman was or had been a banker, had money, was interested in profitable investments and had been previously associated with Olsen, who had expertise in business administration and corporate acquisitions. Additionally, Olsen initially brought to the attention of Goodman the possibility of acquisition of the Omega stock for a profitable investment.

The facts of this case are analogous with those in Orvis v. Curtiss, 157 N.Y. 657 (1899), *rev'g* 12 Misc. Rep. 434 (Dist.Ct. N.Y. City 1895). In the *Orvis* case, H. comes to S. and represents: The business of trading in old, rare musical instruments is a very lucrative one but it takes a lot of capital which I do not have. You have the money and I have the know-how, setup and contacts. I am asking you to come into business with me. I guarantee that you won't lose anything. You will first be repaid every cent you advance with 6% interest, and when the last item of our collection is sold, after first deducting the legitimate expenses, we will split the net profits.

Under this fact situation, the Court in *Orvis* held that these facts defined a partnership or joint venture and that the defense of usury was not applicable.

The only variance in the case at bar is that in addition to the *Orvis* minimum factors, Olsen made additional guarantees in order to induce Goodman to consummate the agreement.

Albeit, even assuming arguendo that the agreement under review was not a joint venture under New York law, the fact that the purchase-back clause, with only the possibility of damage to Olsen, created a contingency. As such, there was no certainty that the bonus to Goodman would accrue. For example, if Olsen had repaid his $150,000 and the stock increased in value, then Olsen would not have been indebted to Goodman for anything. Indeed, Olsen would have been "home free and ahead of the game." Hence the agreement can not within reason be considered usurious. See: *Cusick v. Ifshin, supra.*

Finally, the last factor indicating that the parties anticipated a joint venture when they consummated the agreement is that the loan to Olsen of the $150,000

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was interest free; indicating that Goodman intended to derive any and all gain not from his partner (unless the venture possibly failed) but rather from the strength of their investment.

Therefore, under the cited New York authorities, the acceptance of the interposition of the defense of usury and instructions to the jury thereon in this action tried in Florida was error.

Since the defense of usury in the trial of this cause went to the heart of the action, and since the determination of the issues and liabilities of the parties are primarily questions of fact (with the assumption there are or may be defenses other than usury to be interposed), the cause is hereby reversed and remanded for a new trial.

It is so ordered.

ADKINS, C.J., ROBERTS, ERVIN and BOYD, JJ., Concur OVERTON, J., Dissents with opinion

Overton, J., dissenting.

In my opinion, jurisdiction has been improperly granted. There is no conflict. I would discharge the writ and affirm the Circuit Court and the Third District Court of Appeal.

APPENDIX "D"

IN THE SUPREME COURT OF FLORIDA
CASE NO. 45,356
DCA CASE NO. 72-798

SAUL GOODMAN, *Petitioner,*	)	
vs.	)	PETITION FOR RE-HEARING
RICHARD H. OLSEN, *Respondent.*	)	

Respondent, RICHARD H. OLSEN, moves this Court to withdraw and set aside the Opinion filed November 7, 1974 and to grant a re-hearing in the above cause upon the following grounds: [For ease of reference a copy of the Court's Opinion is attached with numbered paragraphs which are referred to herein.]

1. This Court attempts to take jurisdiction on the basis of conflict under Article V, Section 3(b)(3) of the Constitution of the State of Florida utilizing as a basis for conflict two Florida cases cited in the Petition, dealing completely with violations of professional ethics by lawyers under the Florida Integration Rule,[1] but at the same time this Court has in its Opinion (Page 2, Paragraphs 7 and 8) readily admitted that the laws of

[1] *State of Florida ex. Rel., The Florida Bar v. Delves*, 160 So. 2d 114; *Florida Bar v. O. E. Pitts*, 219 So. 2d 427.

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the State of New York, and the decisional interpretations thereof, must control with reference to the construction of the contract herein involved. Thus this Court's Opinion makes it obvious that no conflict exists.

2. The Court has failed to recognize in its Opinion (Page 1, Paragraph 2) that the Goodman-Olsen agreement was not "characterized" as a loan by Goodman to Olsen, but, in fact, spelled out specifically that the sum of $150,000.00 was a direct loan, and further set forth specifically the terms of repayment and the interest profit which Goodman was to receive.

3. The Court on Page 2, Paragraph 4 of the Opinion has wholly failed to recognize that the repayment on the loan was $50,000.00 and not $60,000.00. The sum of $10,000.00 having been demanded as additional interest or a rebate by the lender, Goodman, prior to permitting the check for the total amount given to Olsen to be cleared.

4. The Court indicated on Page 2, Paragraph 5 of its Opinion, a failure to clearly examine the record which shows that Goodman filed a suit not for the $90,000.00 balance of the loan, but upon a claim for $150,000.00. Moreover, the record further supports the fact that after the payment of $50,000.00 was made Goodman still sought to claim the balance of the debt to be $100,000.00, thus again verifying that the $10,000.00 initially demanded by Goodman was a payment of interest and not principal. Furthermore, the record clearly shows that Olsen's defense had two aspects, (1) the initial payment of $10,000.00, extracted by Goodman, which was not part of the agreement and constituted usury and (2) the buy back portion of the agreement demanded by Goodman which likewise constituted a usurious bonus to Goodman.

5. While the Court in its Opinion on Page 3, Paragraph 9 sets forth the proper general rule of the law of New York on the subject of usury, the Court subsequently misapplies completely this rule of law by interpreting the buy back provision of the agreement to be a contingency over which the borrower has control when, in fact, the borrower, Olsen, had no control over the contingency and was at the mercy of the lender, Goodman. The only contingency aspect of the transaction was that Goodman might not demand the repurchase of the stock, but clearly he had the power to make such a demand and this contingency was completely within his control, thus usurious, and not within the control of Olsen. This usurious provision of the contract has been completely by-passed by this Court.

6. The Court on Page 3, Paragraphs 9 and 10 of the Opinion cites cases involving general law of New York which are completely dissimilar and involve factual situations which are far removed from the factual situation in the case at bar and have no reasonable application to the issue of contingency or joint venture.

7. The Court in the Opinion on Page 3, Paragraph 12 agrees with the settled decisional law that the language contained in the agreement is not controlling, but that the answer lies in the intent of the parties, thereby clearly indicating a holding that such a factual situation is for the determination of a jury and not the Court. Although, the jury made a full determination on this factual situation, to the effect that usury was present, this Court has taken these issues of fact completely away from the jury and has undertaken to become a trial forum for the determination of facts.

8. This Court attempts on Page 4, Paragraphs 14 and 15 of the Opinion to utilize as support for its position the case of *Orvis v. Curtiss*, 157 N.Y. 657; 52

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NE 690 (CA NY 1899) and has quoted liberally therefrom. However, it is interesting to find that a careful reading of the *Orvis* case fails to disclose the quotation cited. Nor does the case refer to musical instruments, nor are musical instruments mentioned anywhere in the case. Apparently the factual situation attributed to the *Orvis* case was obtained in part from the case of *Salter v. Havivi*, 215 N.Y.S. 2d 913 (Sup.Ct. NYCo. 1961). A case which again fails to reflect the factual situation of the case at bar. In both *Orvis* and *Salter* there was no loan, whereas in the present case the agreement itself specifically refers to a loan and the terms of repayment. In quoting from the *Salter* case the Court has failed to use both of the examples set forth on Page 916 of the reported case. Example number 1 which is determined to be usurious is the one which obviously fits the case at bar and which was omitted in the preparation of the Court's Opinion. It reads as follows:

> "Case No. 1. H. comes to S. and says to him: "I am thinking of going into the business of trading in old, rare musical instruments but this requires a lot of capital which I do not have. You have the money. I would like you to lend it to me." S. answers: "I shall lend you the money on the condition that you will repay the loan with 6% interest and if you make a profit in your business, you will give me 50% of it after first deducting all legitimate expenses"."

[A copy of the *Salter* case is attached hereto for reference.]

9. This Court has completely ignored the issue of usury consisting of the demand by Petitioner, Goodman, and the payment to him of $10,000.00 at the inception of the transaction. After Petitioner, Goodman, had given Respondent, Olsen, his check for the stock and the check had been paid to the company for the purchase of the stock, Petitioner, Goodman, advised Respondent, Olsen, he had stopped payment on the check and would only let it clear collection if he were paid the $10,000.00. Although this matter was argued at length by the Respondent, Olsen, and no reply was ever made thereto by the Petitioner, Goodman, it still remains a completely undecided issue as far as the Opinion of this Court is concerned. It can only be concluded that the failure of the Court to respond to this issue is indicative that this Court has not fully reviewed all of the facts and issues put before the Court. On this point the Court has chosen to completely disregard the case of *Breunich v. Wesselman,* 100 N.Y. 609, 2 NW 385, which case fits precisely the factual situation of the case at bar and is determinative of the issues. [A copy of the *Breunich* case is attached for reference].

10. This Court by its Opinion on Page 5, Paragraphs 17, 18 and 19 seeks to deprive the Respondent of the utilization of the defense of usury in a retrial of this cause. The issue of usury having already been determined by a jury, the Respondent is entitled, if this Court views some procedural errors to have occurred, to at least to have that issue re-tried by the jury. In refusing this right this Court is casting itself in the role of trial judge and trial jury and has proceeded to erroneous conclusions in its attempted determination of the facts and the applicable law.

WHEREFORE, the Respondent respectfully urges this Court to grant a re-hearing in this cause in that the

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present Opinion of this Court improperly grants jurisdiction and further is contrary to the facts and the law applicable thereto and fails to pass upon essential issues presented to the Court.

Respectfully submitted,

PRUNTY ROSS DeLOACH & OLSEN
Attorneys for Respondent
837 City National Bank Bldg.
Miami, Florida 33130

By/s/ John W. Prunty
JOHN W. PRUNTY

I HEREBY CERTIFY that a true copy of the foregoing Petition for Re-Hearing was mailed to Frank Ragano, Esq., 28 W. Flagler Street, Suite 400, Miami, Florida, 33130 and to Law Offices of Leo Greenfield, P.A., 1680 NE 135th Street, Suite 200 West, North Miami, Florida, 33161 Attorneys for Petitioner, on the 9th day of December, 1974.

/s/ John W. Prunty
Attorney

APPENDIX "E"

AFFIDAVIT

STATE OF FLORIDA)
) SS:
COUNTY OF DADE)

(THE AFFIDAVIT OF FRANK RAGANO, *DE HORS* THE RECORD, IN RESPONSE AND IN CLARIFICATION OF THE AFFIDAVIT OF MARC H. GLICK

BEFORE ME, the undersigned authority, on this date, personally appeared FRANK RAGANO, who, upon being first duly sworn, under oath, deposes and says:

1. I am FRANK RAGANO, a Miami and Tampa attorney, referred to by Mr. Marc H. Glick in his Affidavit offered in personal support of the Petitioner's cause, and printed as Appendix "G" to Petitioner's Petition in the case of *Olsen vs. Goodman.*

2. In the interests of justice, and to clarify certain scurrilous and scandalous allegations made by Mr. Glick in his Affidavit, I am presenting herein additional clarifying facts in order that the true picture of the matter may be presented to this Honorable Court.

A. That during the period of time that the Impeachment Committee described in Glick's Affidavit was conducting hearings, I was subpoenaed by Marc H. Glick, and appeared before him at his office in Tallahassee, Florida, at which time he took my deposition. That I was questioned at length in regard to the cases of *Lombardosi vs. Wainwright,* Case No. 41,0001; and *Goodman vs. Olsen,* Case No. 43,168. It is to be noted that the Defendant, Lombardosi, received a twenty (20) year prison sentence, which is presently being served, and which conviction was affirmed by the

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Supreme Court of Florida, with Justice McCain participating. That I testified under oath that I met Justice David McCain for the first time in the Supreme Court Building, approximately one year subsequent to the time of the alleged incident that Marc H. Glick describes in his Affidavit, in regard to the Lombardosi case.

I further testified that I had not, at any time, under any circumstances, spoken to Justice McCain, or any of the other six (6) Supreme Court Justices of Florida regarding the *Goodman vs. Olsen* case, or the *Lombardosi* case. In addition thereto, I testified that during the period of time that Justice McCain was on the Bench of the Supreme Court of Florida, I had three (3) criminal cases before said Court, and that certiorari was denied, in each one of those cases, and that the Defendants therein subsequently began serving prison terms of life imprisonment, twenty (20) years imprisonment, and twelve (12) years imprisonment. That Affiant is primarily a defense lawyer in criminal cases, and that during the period of time that Justice McCain was on the Bench of the Supreme Court of Florida, this Affiant lost all three (3) criminal cases that he had before the Supreme Court of Florida.

B. That upon the completion of the taking of my deposition by Marc H. Glick, I volunteered to go before the Select House Impeachment Committee, and was informed by Marc H. Glick that he would not require my appearance, and he excused me.

C. At no time have I ever discussed the *Goodman vs. Olsen* case with Justice McCain, or any other Member of the Supreme Court of Florida, as I testified under oath at the above described time and place.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

/s/ Frank Ragano
FRANK RAGANO

Sworn to and subscribed before
me this 18th day of July, 1975.

/s/ Rose E. Fink
Notary Public, State of Florida
at Large

My Commission expires:
December 5, 1977

BLEED THROUGH